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Supreme Court, U.S.
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No. 97-1718

In The

Supreme Court of the United States

October Term, 1997

MARILYN MOSS,

Petitioner,

vs.

PEGGY GARRITY, PEGGY GARRITY, A CORPORATION, DOUGLAS BENEDON, GERALD SERLIN AND BENEDON & SERLIN, A PARTNERSHIP,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. REASONS FOR DENYING THE PETITION

NOW COME Respondents Douglas G. Benedon, Gerald M. Serlin and the law firm of Benedon & Serlin (collectively referred to herein as "Respondents") and oppose Marilyn Moss' Petition for Certiorari before this Court. As grounds therefor, Respondents state that Petitioner has misstated grounds for jurisdiction, has misstated the facts of the case and has failed to articulate any appropriate ground upon which this Honorable Court should accept certiorari of the instant matter.

A. Petitioner has Failed to Invoke the Jurisdiction of this Court

Contrary to Petitioner's assertion, there is no Federal question at issue in this litigation. Petitioner obtained a $3,000,000 verdict in a sexual harassment claim. The instant litigation arises from Petitioner's failure to pay attorneys who represented her in connection with that trial. The failure to pay counsel sounds in state contract law and, accordingly, that dispute was litigated in California's state courts. Thus, no Federal question is at issue and Petitioner's assertion as to the jurisdictional basis for this petition is in error.

B. Petitioner has Submitted an Improper Statement of the Case

Petitioner's Statement of the Case is erroneous and unsupported by the record. Following is an accurate recap of the events to date.

From 1987 to 1995, Petitioner hired, fired and sued four sets of attorneys, each of whom represented her in connection with a sexual discrimination and harassment suit in which Petitioner received a $3,000,000 judgment. On or about May 27, 1987, Petitioner hired John Burton and the firm Gronemeir, Barker & Huerta ("First Counsel") to represent her against her former employer, the Atchison, Topeka & Santa Fe Railroad ("Railroad"). First Counsel filed its state court action on August 18, 1987. That case was removed to Federal Court on or about October 10, 1989. Two and a half years later, Petitioner fired First Counsel and, on or about February 20, 1992, hired Respondent Peggy Garrity ("Second Counsel") to represent her in the same suit. Three and a half months later on May 11, 1992 Petitioner, through Second Counsel, sued First Counsel for malpractice.

On or about June 16, 1992, Petitioner received a $3,000,000 Stipulated Judgment in her case against Railroad. Petitioner refused to pay First Counsel for their efforts in that case and First Counsel consequently cross-complained in Petitioner's malpractice action against them, seeking recovery of their fees. On or about September 18, 1992, that action was sent to binding arbitration by Los Angeles Superior Court Judge Kitching.

On or about May 26, 1993, the arbitration panel returned an award in favor of First Counsel and against Petitioner for $654,833.33 in attorneys' fees arising out of Petitioner's action against Railroad, in which Petitioner had obtained a $3,000,000 judgment. That award of attorneys' fees was confirmed as a Judgment by the Los Angeles Superior Court on September 13, 1993.

On or about February 2, 1994, Petitioner hired Respondents Henry Walsh, Tim Giles and LAWLER, BONHAM & WALSH ("Third Counsel") to move to vacate the arbitration award. Their motion was filed on February 24, 1994 and was denied. On or about August 29, 1994 Petitioner hired RESPONDENTS DOUGLAS G. BENEDON, an individual, GERALD M. SERLIN, an individual and BENEDON & SERLIN, a partnership (referred to herein as "Fourth Counsel" or "RESPONDENTS") solely to appeal the denial of the motion to vacate. On appeal, Fourth Counsel obtained a reduction of over $96,000 in Petitioner's favor. Not satisfied, Petitioner directed Fourth Counsel to file a Petition for Review with the California Supreme Court in an effort to overturn the remainder of the arbitration award. Fourth Counsel then filed the Petition which was denied on or about August 30, 1995. Fourth Counsel's representation of Petitioner terminated upon denial of the Petition for Review.

Having already sued First Counsel for malpractice, Petitioner then filed a second malpractice action ("Second Malpractice Action"), from which this appeal arises, against Second Counsel, Third Counsel and Fourth Counsel/RESPONDENTS. The Second Malpractice Action rested on one ground. According to Petitioner, each attorney after First Counsel should have raised as a dispositive defense the following argument. Because the fee dispute which led to the arbitration award against her and in favor of First Counsel arose from First Counsel's representation of Petitioner in a Federal Court action, the fee dispute itself could only have been heard in a Federal Court.

On October 29, 1996, the trial court in the Second Malpractice Action sustained the demurrer of Fourth Counsel/RESPONDENTS without leave to amend. The trial court found Petitioner's argument that a fee dispute arising from representation in a Federal Court matter had to be litigated in a Federal Court to be without merit. Moreover, the trial court ruled that the Complaint could not be remedied, resting as it did solely on an erroneous interpretation of the law. The trial court entered judgment in favor of RESPONDENTS and directed Petitioner to pay costs.

Petitioner appealed those orders first to the Appellate Court, which affirmed the trial court, and then by way of a Petition for Review to the California Supreme Court which denied the Petition for Review. Petitioner now seeks review in this Honorable Court.

As delineated below, Petitioner has failed to meet her burden and, accordingly, the Petition for Writ of Certiorari should be denied.

C. Petitioner has Failed to Demonstrate a Conflict in Authority

Pursuant to *Supreme Court Rule* 10, review on a writ of certiorari is subject to judicial discretion. In exercising its discretion, the Court would ordinarily consider various factors. The only two which apply to state court action are Rule 10(b) and (c). Those provisions indicate that this honorable Court could accept certiorari if

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of

> last resort or of a United States Court of Appeals; or
>
> (c) a state court or a United States Court of Appeals has decided an important question of state law that has not been, but should be, settled by this Court, or has decided an important question in a way that conflicts with relevant decisions of this Court.

Petitioner does not demonstrate either ground. To the extent that Petitioner attempts to manufacture a dispute between circuits, she is in error. The cases she cites, *Palomas Land and Cattle v. Baldwin*, 189 F.2d 936 (9th Cir. 1951) and *Joos v. Intermountain Health Care, Inc.*, 25 F.3d 915 (10th Cir. 1994) are not in conflict. The former addresses attorneys' fees arising out of a Federal statute. The latter addresses attorneys' fees accruing outside a Federal statute. The latter is applicable to the instant case in which the attorneys' fee dispute arose as a matter of contract law, properly litigated in the state court.

D. Error is Insufficient Ground on Which to Grant Petition

Petitioner asserts that the trial court, intermediate appellate court and California Supreme Court all committed error in allowing the Respondents' demurrer to be sustained without leave to amend. Pursuant to *Supreme Court Rule* 10,

> a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual finding or the misapplication of a properly stated rule of law.

There is no error in treating fee disputes differently and litigating them in different forums where they arise from different legal grounds. Disputes over fees which arise from and are regulated by Federal law should be litigated in Federal Court. Disputes over fees which arise from and are regulated by state contract law should properly be litigated in state courts. Since error is the ground upon which Petitioner seeks certiorari, Respondents respectfully move this Court to deny her petition.

II. CONCLUSION

Based on the foregoing, and the record before this Court, Respondents respectfully move this Court to deny Marilyn Moss' Petition for Writ of Certiorari.

DATED: May 18, 1998

Respectfully submitted,

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